Editor's note: 81 I.D. 83

UNITED STATES

v.

EUGENE STEVENS

IBLA 73-428 Decided February 21, 1974

Appeal from decision of Chief Administrative Law Judge L. K. Luoma in mining contest W-37335.

Affirmed.

Administrative Procedure: Adjudication--Administrative Procedure: Hearings--Constitutional Law: Due Process--Mining Claims: Contests--Rules of Practice: Government Contests

The procedures of the Department of the Interior in mining contests, where notice and an opportunity for a hearing before a qualified Administrative Law Judge are afforded, comply with the Administrative Procedure Act and the due process requirements of the Constitution.

Administrative Procedure: Adjudication--Administrative Procedure: Hearings--Constitutional Law: Generally--Mining Claims: Hearings--Rules of Practice: Hearings

The fact that a hearing in a mining contest is conducted by an Administrative Law Judge who is an employee of the Department of the Interior, that there are witnesses employed by this Department, and that appellate review is conducted by Departmental employees does not establish unfairness in the proceeding. To disqualify an Administrative Law Judge, or a member of the Board of Land Appeals reviewing his decision, on the charge of bias, there must be a substantial showing of personal bias; an assumption that he might be predisposed in favor of the Government is not sufficient.

Administrative Procedure: Hearings--Constitutional Law: Generally--Mining Claims: Hearings--Rules of Practice: Hearings

There is no right under the seventh amendment of the Constitution to a jury trial in an administrative hearing on a mining

contest, as that amendment does not apply to quasi-judicial administrative proceedings.

Mining Claims: Discovery: Marketability

In order to demonstrate a discovery of a valuable mineral, one must prove by a preponderance of the evidence the presence of minerals that would justify a prudent man in the expenditure of his labor and means with the reasonable prospect of success in developing a paying mine.

Mining Claims: Common Varieties of Minerals: Generally

Without evidence that stones similar to those found in great abundance elsewhere have a property giving them a special and distinct value, they are common varieties no longer locatable under the mining laws. The fact that stone may be tumbled and polished for

rock hound purposes is not sufficient to meet the test.

Mining Claims: Generally--Mining Claims: Discovery: Generally--Mining Claims: Surface Uses

The sale of permits to rock hounds to collect stones on claimed lands is not a mining operation within the meaning of the mining law; income from the sale of such permits cannot properly be considered in determining if a discovery of a valuable mineral deposit has been made.

APPEARANCES: Eugene Stevens, pro se; George E. Longstreth, Esq., Office of the Regional Solicitor, Department of the Interior, Denver, Colorado, for the United States, at the hearing only.

OPINION BY MRS. THOMPSON

Eugene Stevens has appealed from a decision of Chief Administrative Law Judge L. K. Luoma dated May 10, 1973, which invalidated the claimant's Agate Nos. 1 through 200 lode mining claims. This block of contiguous claims was located in 1971 for gemstone, gypsum, uranium, and thorium. (Tr. 9-10.) In October 1972, the

Bureau of Land Management (BLM) issued a complaint charging that the claims were not used for mining purposes, and that valuable minerals had not been found so as to constitute a discovery within the meaning of the mining laws. A hearing was held before Judge Luoma on January 11, 1973.

The Judge invalidated the 200 claims on three independent grounds: (1) that the "gemstone" chert on the claims is a placer deposit, and under the mining law a placer discovery will not sustain a lode location; (2) that the "gemstone" chert on the claims is a common variety material withdrawn from location under the mining law by the Act of July 23, 1955, 30 U.S.C. § 611 et seq. (1970); and (3) that even if the material were uncommon, the claimant failed to show a discovery of a valuable mineral deposit.

Contestee contends generally that there are valuable locatable minerals on the claims. The main thrust of his appeal, however, is that his rights under the United States Constitution have been violated by the contest. He asserts, inter alia, that the Administrative Law Judge, because he is not in the Judicial Branch of the Government, is not empowered to deprive him of property under the fifth amendment, and that the hearing itself was unfair in that everyone involved except himself was "on the payroll of the Department of the Interior." He also asserts that he was deprived of the

right under the seventh amendment of the Constitution to a jury trial provided for in courts of common law.

Concerning these threshold due process of law questions, we hold appellant's contentions lack merit. It is well-established that this Department may determine the validity of mining claims by an administrative contest proceeding which provides the claimant the right to a hearing before a qualified hearing officer. United States v. Coleman, 390 U.S. 599 (1968); Best v. Humboldt Placer Mining Co., 371 U.S. 334 (1963); Cameron v. United States, 252 U.S. 450 (1920); Davis v. Nelson, 329 F.2d 840, 846 (9th Cir. 1964).

Administrative due process in a mining contest is satisfied whenever a mining claimant is afforded adequate notice and an opportunity for a fair hearing. Best v. Humboldt Placer Mining Co., supra; Cameron v. United States, supra. Due process is assured in that the exercise of the Secretary of the Interior's plenary authority over the public lands, 43 U.S.C. § 1201 (1970), is subject to the normal process of judicial review. 5 U.S.C. § 702 (1970); Orchard v. Alexander, 157 U.S. 372, 383-84 (1895).

Judge Luoma is a qualified hearing officer authorized to conduct hearings under the Administrative Procedure Act, 5 U.S.C. § 556 (1970). The procedures followed in mining contests comport

with the Act and the requirements of due process of law in the Constitution. United States v. Gunn, 7 IBLA 237, 79 I.D. 588 (1972); United States v. Bass, 6 IBLA 113 (1972); United States v. Haas, A-30654 (February 16, 1967), and cases cited therein.

Appellant has detailed no specific instance of bias or impropriety at the hearing; he has made only a general allegation that employees of the Department of the Interior would not act in his favor. Appellant's argument carried to its logical end would eliminate administrative proceedings by disqualifying all Departmental employees: the BLM mineral examiner who acts as a witness, the Administrative Law Judge, and this Board. Such an argument cannot be taken seriously. Appellant must show more than a visceral objection to establish unfairness in the contest.

A BLM mineral examiner who is a witness in a Government contest against a mining claim is not disqualified nor is his credibility discredited merely because he is an employee of that agency, or because the contestee asserts that the witness will not testify in his favor. United States v. Zerwekh, 9 IBLA 172 (1973). See also Udall v. Snyder, 405 F.2d 1179, 1180 (10th Cir.), cert. denied, 396 U.S. 819 (1969). In order to sustain a charge that an Administrative Law Judge should be disqualified or his decision set aside because of bias, a substantial showing of personal bias must be made. An assumption that he might be predisposed in favor of the

Government is not sufficient. Converse v. Udall, 262 F. Supp. 583 (D. Ore. 1966), aff'd on other grounds, 399 F.2d 616 (9th Cir. 1968), cert. denied, 393 U.S. 1025 (1969); United States ex rel. De Luca v. O'Rourke, 213 F.2d 759, 763 (8th Cir. 1954). This rule is equally applicable to Members of this Board who review the claimant's appeal and the Judge's decision. See 43 CFR 4.27(c); see also NLRB v. Donnelly Garment Co., 330 U.S. 219, 236 (1947); Texaco, Inc. v. FTC, 336 F.2d 754, 760 (D.C. Cir. 1964); Berkshire Employees Association of Berkshire Knitting Mills v. NLRB, 121 F.2d 235, 238-39 (3d Cir. 1941). Therefore, the mere fact the witnesses, the Administrative Law Judge, and Members of this Board are employees of the Department of the Interior does not establish unfairness in the contest proceeding.

At the hearing, appellant had the right to cross-examine witnesses, and to present evidence to establish his rights under the mining laws. Nothing in the hearing record evidences any unfairness or bias. Nor has appellant pointed to any error of law prejudicial to the result in this case.

Appellant's contention that he was denied his seventh amendment right to a jury trial is also without merit. Statutory rights adjudicated in administrative proceedings, such as mining claim contests, were unknown at common law, and the amendment does not extend to such quasi-judicial administrative proceedings. NLRB v. Jones

& Laughlin Steel Corp., 301 U.S. 1, 48-49 (1937); McFerren v. County Board of Education of Fayette County, 455 F.2d 199, 202-03 (majority opinion), 205-06 (dissenting opinion) (6th Cir. 1972); Lowry v. Whitaker Cable Corp., 348 F. Supp. 202, 209 n.3 (W.D. Mo. 1972); Melancon v. McKeithen, 345 F. Supp. 1025, 1041 (E.D. La. 1972); Farmers' Livestock Commission Co. v. United States, 54 F.2d 375, 378 (E.D. Ill. 1931); 1 K. DAVIS, ADMINISTRATIVE LAW TREATISE 594 (1958).

We turn now to the question of the validity of the claims. Testimony by two expert witnesses for the Government detailed their examinations of the claims. Basically, they stated there were no mining workings on the claims and gave their opinions that there were no valuable mineral deposits exposed within the claims.

Discovery of a valuable mineral deposit is the sine qua non of the validity of a mining claim. United States v. Coleman, supra. In order to prove a discovery within the meaning of the mining law, 30 U.S.C. § 21 et seq. (1970), the claimant must show the discovery of such quantity and quality of minerals that

> * * * a person of ordinary prudence would be justified in the further expenditure of his labor and means, with a reasonable prospect of success, in developing a valuable mine * * *.

Castle v. Womble, 19 L.D. 455, 457 (1894), approved in Chrisman v.

Miller, 197 U.S. 313, 322 (1905); Best v. Humboldt Placer Mining Co., supra; United States v. Coleman, supra.

The testimony of the Government's witnesses was sufficient to establish a prima facie case of the invalidity of the claims for failure to make a discovery. The burden of proof was then upon the claimant to show by a preponderance of the evidence that a discovery had been made. Foster v. Seaton, 271 F.2d 836 (D.C. Cir. 1959). This he failed to do.

There is no support in the record for appellant's assertions relating to discovery of valuable minerals locatable under the mining laws. The Government introduced evidence on the nature and extent of the calcium sulfate (gypsum) deposits and the presence or absence of uranium and thorium on the claims. Contestant's witness, Larry Steward, a Bureau of Land Management geologist, testified that he took four samples from calcium sulfate outcrops on Claims 65, 71 and 73, and the analytical report indicated that the material was at least partially anhydrite. (Ex. 24.) The evidence indicated, as the Judge found, that anhydrite deposits generally, and these in particular, have no current value for mining purposes. (Tr. 38, 57.)

During his examination of the surface of the claims, the geologist took scintillator (Geiger counter) readings and samples

on the rock types he encountered. This examination disclosed no evidence of uranium or thorium. (Tr. 16-17.)

Appellant offered no evidence at all, and there is no serious assertion that valuable deposits of uranium or thorium have been found within any of the claims. Any assertion by appellant that the anhydrite material on the claims has any commercial value is self-serving conjecture without any substantiation, and contradicted by expert testimony. Nor was there any value shown for any other types of gypsum on the claims.

The only indication of any commercial value concerns the material described as cryptocrystalline varieties of silica, commonly called chert, which is scattered on the surface of some of the claims.

Appellant asserts that this material and agate found on the claims is gemstone in quality. It is evident that the stone is of such a hardness that it can be tumbled and polished, but such material is found in great abundance not only on the claims, but also on nearby public lands, and in many other locations throughout the West. (Tr. 60, 64, 80.) The Government witness testified that any stone of "possibly a four or five and on up to a ten hardness on a Mohs' scale of hardness would provide a polish." (Tr. 22.) The market for the stone is for rock hound purposes, gathering

and collecting, for curios, and for polishing and cutting to make into "gemstones" for jewelry or ornamental objects. The evidence did not disclose that the stones on the claims have any property giving them special or distinct value which takes them out of the category of a common variety within the meaning of 30 U.S.C. § 611 (1970). Without evidence that the stone is an uncommon variety within that Act, it is no longer locatable under the mining laws. United States v. Coleman, supra; United States v. Melluzzo, 70 I.D. 184 (1963). See United States v. Cardwell, A-29819 (March 11, 1964); United States v. Shannon, 70 I.D. 136 (1963).

The mere fact the stones may be polished is not sufficient to meet the uncommon variety test, as hardness, the prime requisite for polishing, is a property common to many types of stone found in great abundance. It is the value of the stone deposit as it is found on the claims that is the important factor, not any enhanced value which might be obtained for a fabricated or marketed product of the deposit. McClarty v. Secretary of the Interior, 408 F.2d 907, 909 (9th Cir. 1969).

Appellant contends he has sold some rocks from the claims and that the value of the material is demonstrated by the activities of other individuals who have removed stones from the claims under permits he issued. However, the record does not disclose evidence of sales of the stone from the claims, but only of privileges granted

by the claimant to others relating to the use of the land. Evidence regarding the value or the use of the land for other than legitimate mining purposes relates to the bona fides of the claimant and throws light on the true value of the land. See United States v. Coleman, supra at 603.

The evidence indicated that the major activity on the claims has been the posting of a number of signs, some of which read "Gemstone Enjoyment Mineral Claims," and "Removal of any Mineral . . . Without a Permit is Prohibited." Other signs erected by Gemstone Enjoyment indicate where Indian sites are located and other points of interest. (Exs. 8-23). Gemstone Enjoyment is a commercial enterprise organized and operated by the contestee. For $15 per year a permit is issued in the name of Gemstone Enjoyment entitling the holder and his family to enter and camp on the claims and remove any rocks or minerals up to a maximum of 150 tons per permit per year. Gemstone Enjoyment has advertised for members in the magazine Lapidary Journal (Ex. A), and has a brochure promoting the benefits of membership and the nature of the claims. (Ex. 17.)

The evidence demonstrated that there was no market for the unprocessed material from the claim. (E.g., Tr. 15, 47-48, Ex. 25.) However, the contestee sold about $1,000 worth of Gemstone Enjoyment permits during 1972. (Tr. 91.)

The income from the sale of Gemstone Enjoyment permits is not properly to be considered as income from a mining operation. See South Dakota Mining Co. v. McDonald, 30 L.D. 357, 360 (1900). As was stated in United States v. Elkhorn Mining Co., 2 IBLA 383, 389 (1971), aff'd, Elkhorn Mining Co. v. Morton, Civ. No. 2111 (D. Mont., filed January 19, 1973):

> However, not every profitable enterprise conducted upon the public lands entitles the entrepreneur to a patent under the mining laws. * * * The expenditure of means and labor must be for the benefit of a mining operation from which minerals can be extracted and marketed. The marketed commodity must be the product of this mining operation.

Here, the claimant is marketing permits, not mineral material. In fact, the claimant is charging the public to do what it has the right to do freely on public land. 43 CFR Part 6010. See also 43 CFR 3621.1 (providing for the free use of minerals not for sale or barter); 43 CFR 3712.1 (restricting the use of unpatented mining claims). Gemstone Enjoyment is not a mining operation as contemplated by the general mining laws, and the income from its operation could not properly be considered in determining if a discovery had been shown on the Agate claims.

It is apparent from appellant's testimony that his expenses have been in hiring others to stake the claims for him, recording the location notices, and the printing of brochures and mailing

and advertising costs for his Gemstone Enjoyment enterprise. These expenses totaled approximately $2,000 for the 200 claims. (Tr. 91-92.) Asked if his agents who located the claims had found valuable minerals on the ground before the claims were located, he testified, "That I don't know. You are asking me what another man did." (Tr. 90.)

The only discovery effort on the claims shown by the claimant is as follows:

> A. Well, I have done some pick and shovel work out there, investigative, and incidentally, as long as I am testifying under oath, I have found agate in stratified form at several different places on the claims. Not on every claim, because a lot of it is in the valley. I am speaking now of certain areas along the ridges. I did find that, and I can take somebody up and show them.
>
> Q. But your market in this case is the coming on the land of people who have a $15.00 permit; is that correct?
>
> A. That is correct, yes, sir.

(Tr. 91.)

* * * * * * *

> Q. Now, if these people that you sold permits to didn't come on the property, then what would you have done?
>
> A. I beg your pardon?
>
> Q. If these rockhounds that you have asked or suggested might want to come on, and pay you the $15.00 for a permit, and they come on each year with a permit, if they wanted to, is that the only market you have?

A. Outside of what I might sell by mail, yes, sir. Mining is very limited.

(Tr. 93.)

It is evident there has been no bona fide attempt to discover minerals, nor to develop a valuable mine, but only an attempt to promote the sale of claimant's "permits" to rock hounds and other recreationists.

The evidence clearly establishes that there has been no discovery of a valuable mineral deposit on any of the 200 claims covering the 4000 acres of land involved here. Proof of discovery as to each claim is required under the mining law. United States v. Bunkowski, 5 IBLA 102, 120, 79 I.D. 43, 51-52 (1972); United States v. Melluzzo, 76 I.D. 181, 189 (1969). This has not been done by the claimant in order to sustain his burden of proof.

As the claims are invalid for lack of a discovery of a valuable mineral deposit locatable under the mining laws, it is unnecessary to consider whether the claims were improperly located as lodes rather than placers, and whether that issue was properly raised by the contest complaint. Therefore, we do not decide whether Judge Luoma's ruling on that issue was correct.

For the reasons discussed above, and pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is affirmed.

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Joan B. Thompson, Member

We concur:

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Edward W. Stuebing, Member

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Douglas E. Henriques, Member